


CERTIFICATION OF CITY CLERK

ORDINANCE NO. 292

I, Mary Lavelle, City Clerk of the City of Milpitas, do hereby certify that the attached Ordinance is a true and correct copy of Ordinance No. 292 of the City of Milpitas, that this Ordinance was duly enacted and adopted by the City Council of the City of Milpitas at a meeting of the City Council held on the 21st of February 2017, and that the Ordinance summary was published in the local newspaper and posted in the manner required by law.

WITNESS my hand and the Official Seal of the City of Milpitas, California, this 2nd of March 2017.

A handwritten signature in cursive script that reads "Mary Lavelle". The signature is written in dark ink and is positioned above a horizontal line.

Mary Lavelle
Milpitas City Clerk

REGULAR

NUMBER: 292

TITLE: AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILPITAS ADDING CHAPTER 31 TO TITLE III OF THE MILPITAS MUNICIPAL CODE TO ESTABLISH A CITY-WIDE MINIMUM WAGE

HISTORY: This Ordinance was introduced (first reading) by the City Council at its meeting of February 7, 2017, upon motion by Vice Mayor Grilli and was adopted (second reading) by the City Council at its meeting of February 21, 2017 upon motion by Councilmember Nuñez. The Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES: (5) Mayor Tran, Vice Mayor Grilli, Councilmembers Nuñez, Barbadillo, and Phan

NOES: (0) None

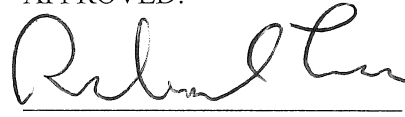
ABSENT: (0) None

ABSTAIN: (0) None

ATTEST:


Mary Lavelle, City Clerk

APPROVED:


Rich Tran, Mayor

APPROVED AS TO FORM:


Christopher J. Diaz, City Attorney

RECITALS AND FINDINGS:

WHEREAS, families and workers need to earn a living wage, and public policies which help achieve that goal are beneficial; and

WHEREAS, payment of a minimum wage advances the interests of the City as a whole by creating jobs that keep workers and their families out of poverty; and

WHEREAS, a minimum wage will enable a worker to meet basic needs and avoid economic hardship; and

WHEREAS, this Ordinance is intended to improve the quality of services provided in the City to the public by reducing turnover, absenteeism, and instability in the workplace; and

WHEREAS, prompt and efficient enforcement of this Ordinance will provide workers with economic security and the assurance that their rights will be respected; and

WHEREAS, key findings of a regional minimum wage study and survey performed by the Institute for Research on Labor and Employment at UC Berkeley and BW Research showed that increasing the minimum wage to \$15.00 an hour by 2019 in Santa Clara County would:

- Increase earnings for 250,000 workers
- Raise average annual earnings of affected workers by 19.4 percent, or \$3,200.00 (in 2014 dollars)
- Slightly increase average prices in Santa Clara County by 0.2 percent over three years
- Have a net effect on employment that is slightly negative at the County level (1,450 jobs) and close to zero at a 10 County regional level;

WHEREAS, the Cities Association of Santa Clara County recommends a regional minimum wage increase to \$15.00 by 2019 as an effort to prevent an uneven playing field that can be damaging to local economies, provide equity to our shared economy, and implement regional consistency across the County; and

WHEREAS, this Ordinance is not preempted by State law, including California Labor Code Section 1182.12, enacted by the State Legislature by Senate Bill 3 effective January 1, 2017, because this Ordinance imposes minimum wage requirements that exceed the State requirements and local minimum wage ordinances have been upheld as a valid exercise of local police power. *RUI One Corp. v City of Berkeley* (9th Cir 2004) 371 F.3d 1137.

NOW, THEREFORE, the City Council of the City of Milpitas does ordain as follows:

SECTION 1. RECORD AND BASIS FOR ACTION

The City Council has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to the City Council. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

SECTION 2. AMENDMENT OF MILPITAS MUNICIPAL CODE ADDING A NEW CHAPTER 31 TO TITLE III

Title III of the Milpitas Municipal Code is hereby amended by adding a new Chapter 31, "Minimum Wage," to read as follows:

Chapter 31 - MINIMUM WAGE

III-31-1.00 - Title

This Chapter shall be known as the "Minimum Wage Ordinance."

III-31-2.00 - Authority

This Chapter is adopted pursuant to the powers vested in the City of Milpitas under the laws and Constitution of the State of California, including, but not limited to, the police powers vested in the City pursuant to Article XI, Section 7 of the California Constitution and Section 1205(b) of the California Labor Code.

III-31-3.00 - Definitions

The following words and phrases, whenever used in this Chapter, shall be construed as defined in this Section:

- (a) "City" shall mean the City of Milpitas, California or any agency designated by the City to administer the terms of this Chapter.
- (b) "Employee" shall mean any person who:
 - 1. In a calendar week performs at least two (2) hours of work for an employer as defined below; and
 - 2. Qualifies as an employee entitled to payment of a minimum wage from any employer under the California Minimum Wage Law, as provided under Section 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission, or is a participant in a welfare-to-work Program.
- (c) "Employer" shall mean any person, including corporate officers or executives, as defined in Section 18 of the California Labor Code, who directly or indirectly through any other person, including through the services of a temporary employment agency, staffing agency or similar entity, employs or exercises control over the wages, hours or working conditions of any employee and who is either subject to the City's business license requirements or maintains a business facility in the City.
- (d) "Governmental agencies" shall include federal agencies, State agencies, counties, school districts and auxiliary organizations as defined under Education Code Sections 72670(c) and 89901. "Governmental agency" does not include the City of Milpitas.
- (e) "Minimum wage" shall have the meaning set forth in Section III-31-4.00 of this Chapter.
- (f) "Welfare-to-Work Program" shall mean the CalWORKS Program, County Adult Assistance Program (CAAP) which includes the Personal Assisted Employment Services (PAES) Program, and General Assistance Program, and any successor programs that are substantially similar to them.

III-31-4.00 - Minimum Wage

(a) Employers shall pay employees no less than the minimum wage set forth in this Section for each hour worked within the geographic boundaries of the City of Milpitas, except when these scheduled increases are temporarily suspended under subdivision (f) below. Governmental agencies are exempt from the minimum wage requirements under the principle of governmental immunity when the work performed is related to the agency's governmental function.

(b) Effective July 1, 2017, the Minimum Wage shall be an hourly rate of eleven dollars (\$11.00). On January 1, 2018, the minimum wage shall be an hourly rate of twelve dollars (\$12.00). On July 1, 2018, the minimum wage shall be an hourly rate of thirteen dollars and fifty cents (\$13.50). On July 1, 2019, the minimum wage shall be an hourly rate of fifteen dollars (\$15.00), except when these scheduled increases are temporarily suspended under subdivision (f). To prevent inflation from eroding its value, beginning on July 1, 2020, and each July 1st thereafter, the Minimum Wage shall increase by an amount corresponding to the increase, if any, in the cost of living, not to exceed 5%, or shall be increased to the State law minimum wage, whichever is greater. The prior year's increase in the cost of living shall be measured by the percentage increase, if any, as of February of the immediately preceding year of the Bay Area Consumer Price Index (Urban Wage Earners and Clerical Workers, San Francisco-Oakland-San Jose, CA for All Items) or its successor index as published by the U.S. Department of Labor or its successor

agency, with the amount of the Minimum Wage increase rounded to the nearest multiple of five (\$.05) cents. If there is no net increase in the cost of living, the minimum wage shall remain unchanged for that year. The adjusted Minimum Wage shall be announced by April 1st of each year, or as soon as practicable thereafter if the Consumer Price Index for February has not yet been published, and shall become effective as the new Minimum Wage on July 1 of that year.

(c) Commissions or guaranteed gratuities, not including discretionary tips, may be counted toward payment of the minimum wage when the commissions or guaranteed gratuities are earned and paid together with other compensation paid to an employee and are equal to or greater than the current minimum wage. For each pay period, employers shall pay the employee an amount that equals or exceeds the current hourly minimum wage.

(d) The employer may offset a portion of the minimum wage for housing and meal costs only if the offsets are the same as those available under the California Minimum Wage Law. The offsets shall only be recognized if there is a prior voluntary agreement between the employer and the employee.

(e) A violation for unlawfully failing to pay the minimum wage shall be deemed to continue from the date immediately following the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2 of the California Labor Code, to the date immediately preceding the date the wages are paid in full.

(f) On or before March 1, 2018, and on or before every March 1, thereafter until the minimum wage is fifteen dollars (\$15.00) per hour, to ensure that economic conditions can support a local minimum wage increase, the Economic Development Department shall annually make a determination and certify to the City Council whether each condition below is met:

- (1) Total nonfarm employment for California, seasonally adjusted, decreased over the three-month period from October to December, inclusive, prior to the March 1 determination. This calculation shall compare seasonally adjusted total nonfarm employment in December to seasonally adjusted total nonfarm employment in September, as reported by the Employment Development Department.
- (2) Total nonfarm employment for California, seasonally adjusted, decreased over the six-month period from July to December, inclusive, prior to the March 1 determination. This calculation shall compare seasonally adjusted total nonfarm employment in December to seasonally adjusted total nonfarm employment in June, as reported by the Employment Development Department.
- (3) California State retail sales and use tax cash receipts from a 3.9375-percent tax rate for the January 1 to December 31, inclusive, period ending one month prior to the March 1 determination is less than retail sales and use tax cash receipts from a 3.9375-percent tax rate for the January 1 to December 31, inclusive, period ending 14 months prior to the March 1 determination. The calculation for the condition specified in this subparagraph shall be made by the Economic Development Department using data posted online by the State Board of Equalization, following the procedure specified in paragraph (1) of subdivision (c) of Section 1182.12 of the California Labor Code as follows:

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- A. The State Board of Equalization shall publish by the 10th of each month on its Internet Web site the total retail sales (sales before adjustments) for the prior month derived from their daily retail sales and use tax reports.
 - B. The State Board of Equalization shall publish by the 10th of each month on its Internet Web site the monthly factor required to convert the prior month's retail sales and use tax total from all tax rates to a retail sales and use tax total from a 3.9375-percent tax rate.
 - C. The Department of Finance shall multiply the monthly total from clause "A" by the monthly factor from clause "B" for each month.

D. The Department of Finance shall sum the monthly totals calculated in clause "C" to calculate the 12-month January 1 to December 31, inclusive, totals needed for the comparison in this subparagraph.

- (4) If, for any year, the condition in either subparagraph (1) or (2) of paragraph (f) is met, and if the condition in subparagraph (3) of paragraph (f) is met, the City Council may, on or before April 1 of each year, make a determination to temporarily suspend the minimum wage increase scheduled for that year.
- (5) If the City Council makes a determination to temporarily suspend the scheduled minimum wage increases for that year, all dates specified in paragraph (b) that are subsequent to the April 1 determination date shall be postponed by an additional year.

III-31-7.00 - Notice, Posting and Payroll Records

(a) By May 1st or as soon as practicable thereafter of each year, the City shall publish and make available to employers a bulletin announcing the adjusted minimum wage rate for the upcoming year. In conjunction with this bulletin, the City shall by May 1st, or as soon as practicable thereafter of each year, publish and make available to employers, in the top three languages spoken in the City based on the latest available census information for the City, a notice suitable for posting by employers in the workplace informing employees of the current minimum wage rate and of their rights under this Chapter.

(b) Every employer shall post in a conspicuous place at any workplace or job site where any employee works the notice published each year by the City informing employees of the current minimum wage rate and of their rights under this Chapter. Every employer shall post such notices in the top three languages spoken in the City based on the latest available census information for the City at the workplace or job site. Every employer shall also provide each employee at the time of hire with the employer's name, address, and telephone number in writing.

(c) Employers shall retain payroll records pertaining to employees for a period of four years, and shall allow the City access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of this Chapter. Where an employer does not maintain or retain adequate records documenting wages paid or does not allow the City reasonable access to such records, the employee's account of how much he or she was paid shall be presumed to be accurate, absent clear and convincing evidence otherwise.

III-31-8.00 - Retaliation Prohibited

(a) It is unlawful for an employer or any other party to discriminate in any manner or take adverse action against any person in retaliation for exercising rights protected under this Chapter. Rights protected under this Chapter include, but are not limited to: the right to file a complaint or inform any person about any party's alleged noncompliance with this Chapter; and the right to inform any person of his or her potential rights under this Chapter and to assist him or her in asserting such rights. Protections of this Chapter shall apply to any person who mistakenly, but in good faith, alleges noncompliance with this Chapter.

(b) Taking adverse action against a person within ninety days of the person's exercise of rights protected under this Chapter shall raise a rebuttable presumption of having done so in retaliation for the exercise of such rights.

III-31-9.00 - Implementation

(a) Guidelines. The City shall be authorized to coordinate implementation and enforcement of this Chapter and may promulgate appropriate guidelines or rules for such purposes. Any guidelines or rules promulgated by the City shall have the force and effect of law and may be relied on by employers, employees and other parties to determine their rights and responsibilities under this Chapter. Any guidelines or rules may establish procedures for ensuring fair, efficient and cost effective implementation of this Chapter, including supplementary procedures for helping to inform employees of their rights under this Chapter, for monitoring employer compliance with this Chapter, and for providing administrative hearings to determine whether an employer or other person has violated the requirements of this Chapter.

(b) Reporting Violations. An employee or any other person may report to the City in writing any suspected violation of this Chapter. The City shall encourage reporting pursuant to this subsection by keeping confidential, to the maximum extent permitted by applicable laws, the name and other identifying information of the employee or person reporting the violation. Provided, however, that with the authorization of such person, the City may disclose his or her name and identifying information as necessary to enforce this Chapter or other employee protection laws. In order to further encourage reporting by employees, if the City notifies an employer that the City is investigating a complaint, the City shall require the employer to post or otherwise notify its employees that the City is conducting an investigation, using a form provided by the City.

(c) Investigation. The City shall be responsible for investigating any possible violations of this Chapter by an employer or other person. The City shall have the authority to inspect workplaces, interview persons and request the City Attorney to subpoena books, papers, records, or other items relevant to the enforcement of this Chapter.

(d) Informal Resolution. The City shall make every effort to resolve complaints informally, in a timely manner, and shall have a policy that the City shall take no more than one year to resolve any matter, before initiating an enforcement action. The failure of the City to meet these timelines within one year shall not be grounds for closure or dismissal of the complaint.

III-31-10.00 - Enforcement

(a) Where prompt compliance is not forthcoming, the City shall take any appropriate enforcement action to secure compliance. All remedies in the Milpitas Municipal Code ("the Code") are considered cumulative and the use of one or more remedies by the City shall not bar the use of any other remedy for the purpose of enforcing these provisions.

- (1) The City may issue an administrative citation pursuant to Title I, Chapter 21 of the Code for each violation and for each employee or person as to whom the violation occurred or continued.
- (2) The City may initiate a civil action for injunctive relief and damages and civil penalties in a court of competent jurisdiction.

(b) Any person aggrieved by a violation of this Chapter, any entity a member of which is aggrieved by a violation of this Chapter, or any other person or entity acting on behalf of the public as provided for under applicable State law, may bring a civil action in a court of competent jurisdiction against the employer or other person violating this Chapter and, upon prevailing, shall be awarded reasonable attorneys' fees and costs and shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation, including, without limitation, the payment of any back wages unlawfully withheld, reinstatement in employment and/or injunctive relief. Provided, however, that any person or entity enforcing this Chapter on behalf of the public as provided for under applicable State law shall, upon prevailing, be entitled only to equitable, injunctive or restitutionary relief to employees, and reasonable attorneys' fees and costs.

(c) This Section shall not be construed to limit an employee's right to bring legal action for a violation of any other laws concerning wages, hours, or other standards or rights nor shall exhaustion of remedies under this Chapter be a prerequisite to the assertion of any right.

(d) Except where prohibited by State or federal law, city agencies or departments may revoke or suspend any registration certificates, permits or licenses held or requested by the employer until such time as the violation is remedied.

(e) Relief. The remedies for a violation of this Chapter include, but are not limited to:

- (1) Reinstatement, the payment of back wages unlawfully withheld, and fines imposed pursuant to other provisions of this code or State law.

- (2) Interest on all due and unpaid wages at the rate of interest specified in subsection (b) of Section 3289 of the California Civil Code, which shall accrue from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2 of the California Labor Code, to the date the wages are paid in full.
- (3) Reimbursement of the City's administrative costs of enforcement and reasonable attorney's fees.

III-31-11.00 - Relationship to Other Requirements

This Chapter provides for payment of a local minimum wage and shall not be construed to preempt or otherwise limit or affect the applicability of any other law, regulation, requirement, policy or standard that provides for payment of higher or supplemental wages or benefits, or that extends other protections.

III-31-12.00 - Application of Minimum Wage to Welfare-to-Work Programs

The minimum wage established pursuant to Section III-31-4.00 of this Chapter shall apply to the Welfare-to-Work Programs under which persons must perform work in exchange for receipt of benefits. Participants in Welfare-to-Work Programs shall not, during a given benefits period, be required to work more than a number of hours equal to the value of all cash benefits received during that period, divided by the minimum wage.

III-31-13.00 - Fees

Nothing herein shall preclude the City Council from imposing a cost recovery fee on all employers to pay the cost of administering this Chapter.

SECTION 3. SEVERABILITY

The provisions of this Ordinance are separable, and the invalidity of any phrase, clause, provision or part shall not affect the validity of the remainder.

SECTION 4. CEQA

The City Council finds, pursuant to Title 14 of the California Code of Regulations, Section 15378(b)(2), that this Ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) in that the adoption of an ordinance of general policy and procedure does not constitute a project within the meaning of CEQA. Further, this Ordinance only addresses the payment of wages and would not have any potential impact on the environment.

SECTION 5. EFFECTIVE DATE AND POSTING

In accordance with Section 36937 of the Government Code of the State of California, this Ordinance shall take effect thirty (30) days from and after the date of its passage. The City Clerk of the City of Milpitas shall cause this Ordinance or a summary thereof to be published in accordance with Section 36933 of the Government Code of the State of California.